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OCTOBER TERM, 1974

* * *

NO. 74-1489

* * *

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS
PETITIONER

v.

DAY AND ZIMMERMAN, INCORPORATED
RESPONDENT

AND

UNITED STATES OF AMERICA
INTERVENOR

* * *

APPENDIX TO THE WRIT OF CERTIORARI

* * *

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APPENDIX I

RELEVANT PROVISIONS FROM VOLUME 20A,

TITLE 122A, TAXATION-GENERAL, V.A.T.S.

APPENDIX I

From Volume 20A, Title 122A, Taxation-General, V.A.T.S.

Art. 20.01 Title-Definitions

This Chapter is known and may be cited as the "Limited Sales, Excise and Use Tax Act," and the following words shall have the following meanings unless a different meaning clearly appears from the context:

(G) Purchase. "Purchase" means:

(1) Any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

(I) Retail Sale or Sale at Retail. "Retail Sale" or "Sale at Retail" means:

(1) Any sale of tangible personal property.

(J) Retailer.

(1) "Retailer" includes:

(a) Every seller engaged in the business of making sales of tangible property for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use or other consumption.

(K) Sale.

(1) "Sale" means and includes any transfer of title or possession or segregation in contemplation of transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

(R) Use. "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that tangible personal property except that it does not include the sale of that tangible personal property in the

regular course of business. "Use" specifically includes the incorporation of tangible personal property into real estate or into improvements upon real estate without regard to the fact that such real estate and improvements may subsequently be sold as such except as provided in Article 20.01 (T) (2).

(S) Sale for Resale. "Sale for Resale" shall mean a sale of tangible personal property to any purchaser who is purchasing said tangible personal property for the purpose of reselling it in the normal course of business either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property. A sale for resale shall include a sale of tangible personal property to a purchaser for the sole purpose of that purchaser's renting or leasing said tangible personal property to another person, but not if

incidental to the renting or leasing of real estate.

Art. 20.02. Imposition of Limited Sales Tax

There is hereby imposed a limited sales tax at the rate of three per cent (3%) on the receipts from the sale at retail of all tangible personal property within this State.

Art. 20.021 Method of Collection; Bracket System

(A) Every retailer shall add the sales tax imposed by Article 20.02 of this Chapter to his sale price and when added the tax shall constitute a part of the price, shall be a debt of the purchaser to the retailer until paid, and shall be recoverable at law in the same manner as the purchase price. It is further specified that where tangible personal property is segregated in contemplation of transfer

of title or possession and is thereafter to be transported by common carrier from the seller to the buyer, with the price fixed F.O.B. the seller's place of business, and with transportation charges separately stated, the tax herein imposed shall be computed only upon the basis of the charge for the tangible personal property itself, exclusive of the separately stated and independently fixed transportation charges. When the sale price shall involve a fraction of a dollar, the tax shall be added to the sale price upon the following schedule:

Amount of Sale	Tax
$ .01 to $ .16	No Tax
.17 to .49	$ .01
.50 to .83	.02
.84 to 1.16	.03
1.17 to 1.49	.04
1.50 to 1.83	.05

Provided, that for successive brackets for this schedule in this paragraph, the tax shall be computed by multiplying three per cent (3%) times the amount of the sale.

Any fraction of one cent ($.01) which is less than one half of one cent ($.005) of tax shall not be collected. Any fraction of one cent ($.01) of tax equal to one half of one cent ($.005) or more shall be collected as a whole cent ($.01) of tax.

When several articles or items of tangible personal property are purchased together and at the same time, the tax shall be computed on the total amount of the several items less the amount paid for any article or item of tangible personal property specifically exempt under the provisions of Article 20.04 of this Chapter.

The use of tokens or stamps for the purpose of collecting or of enforcing the collection of the tax imposed in this Chapter or for any other purpose in connection with such tax is prohibited.

(G) Effect of Resale Certificate. The resale certificate relieves the

seller from the burden of proof only if taken in good faith from a person who is engaged in the business of selling, leasing or renting tangible personal property. A resale certificate may be given by a purchaser, who at the time of purchasing the tangible personal property, intends to sell, lease or rent it in the regular course of business or is unable to ascertain at the time of purchase whether the tangible personal property will be resold, leased or rented in the regular course of business or will be used for some other purpose.

(I) Liability of Purchaser Giving Resale Certificate. If a purchaser who gives a resale certificate makes any use of the tangible personal property other than retention, demonstration or display while holding it for sale, lease or rental in the regular course of business, the use shall be taxable to the purchaser as of

the time when the tangible personal property is first so used, and the sales price of the tangible personal property to him shall be deemed the measure of the tax.

Art. 20.03. Imposition and Rate of Use Tax

An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased, leased or rented from any retailer on or after September 1, 1961, for storage, use or other consumption in this State, at the rate of three per cent (3%) of the sales price of the property, or in the case of leases or rentals, of said lease or rental prices.

Art. 20.04 Exemptions

(A) Constitution and Statutory Exemptions. There are exempted from the taxes imposed by this Chapter the receipts from the sale, lease or rental of the storage, use or other consumption

in this State of tangible personal property the gross receipts from the sale, lease or rental of which, or the storage, use or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State. [Current Article: 20.04 (C)]

(C) Property Used in Manufacturing, Packaging and Containers.

(1) Tangible Personal Property Used in Manufacturing. There are exempted from the taxes imposed by this Chapter the receipts from the sale, lease or rental of and the storage, use or other consumption in this State of:

(a) Tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed or fabricated for ultimate sale at retail within or without this State; and

(b) Tangible personal property used or consumed in or during any phase of such actual manufacturing, processing or fabricating operation, provided that the use or consumption of such tangible personal property is necessary or essential to the performance of such operations. Chemicals, catalysts, and other materials which are used during such operations and which are used for the purpose of producing or inducing a chemical or physical change during such operations or for removing impurities or otherwise placing a product in a more marketable condition are included within the exemption, as are other articles of tangible personal property used in such a manner as to be necessary or essential in the actual manufacturing, processing, or fabricating operations. The exemption provided herein does not include the following:

(i) Machinery, equipment and re-

placement parts and accessories therefor, having a useful life when new in excess of six (6) months;

(ii) Machinery, equipment, materials and supplies used in a manner that is merely incidental to the manufacturing, processing or fabricating operation such as intraplant transportation equipment, and maintenance and janitorial equipment and supplies.

(iii)Hand tools such as hammers, wrenches, saws, etc., and

(iv) Tangible personal property used by a manufacturer, processor or fabricator in any activities other than the actual manufacturing, processing, or fabricating operation such as office equipment and supplies, equipment and supplies used in selling or distributing activities, in research and development of new products, or in transportation activities. [Current Art.: 20.04 E].

(F) United States; State; Political Subdivisions; Religious, Eleemosynary Organizations. There are exempted from the computation of the amount of the taxes imposed by this Chapter, the receipts from the sale, lease or rental of any tangible personal property to, or the storage, use or other consumption of tangible personal property by:

(1) The United States, its unincorporated agencies and instrumentalities.

(2) Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States.

(3) The State of Texas, its unincorporated agencies and instrumentalities.

(4) Any county, city, special district or other political subdivision of this State.

(5) Any organization created for

religious, educational, charitable or eleemosynary purposes, provided that no part of the net earnings of any such organization inures to the benefit of any private shareholder or individual. [Current Art.: 20.04 (H)].

(N) Sale for Resale: Leasing or Renting.

(1) There are exempted from the taxes imposed by this Chapter the receipts from all sales for resale, leasing or renting

(2) However, if a person purchases tangible personal property for the purpose of leasing or renting it to another person, and if he later sells it by means of an occasional sale before he has collected and paid to this State as much tax on the rental or lease charges as would have been due and payable to this State had he not purchased the tangible personal property for the purpose of so renting and leasing it, he shall, at the time of his

occasional sale of said tangible personal property include in his receipts from taxable sales the amount by which his purchase price exceeded the amount of rents collected by him on said tangible personal property.

(3) When a lessor makes a retail sale of leased tangible personal property to a lessee of that tangible personal property under an agreement whereby certain rental payments are credited against the purchase price of that tangible personal property, he need not collect or pay any tax on the sale price to the extent that he has collected and paid on such rental payments. [Current Art.: 20.04 (O)].

APPENDIX II

JUDGMENT OF THE 126TH JUDICIAL

DISTRICT COURT OF TRAVIS COUNTY, TEXAS

APPENDIX II

No. 186,214

126th Judicial District Court
of Travis County, Texas

Day and Zimmermann, Inc.
Plaintiff

And United States of America
Intervenor

v.

Robert S. Calvert, Comptroller of
Public Accounts of the State
of Texas
Defendant

JUDGMENT

On this 16th day of February, 1973, in the above entitled and numbered cause, wherein Day and Zimmerman, Inc. is Plaintiff and the United States of America is Intervenor and Robert S. Calvert, Comptroller of Public Accounts of the State of Texas is Defendant, came the Plaintiff and announced ready for trial, and came the Intervenor and announced

ready for trial, and came the Defendant and announced ready for trial, and the case proceeded to trial before the Court and the Court having duly considered the pleadings on file herein, the stipulation of facts filed by the parties, and the depositions on file with the Court and having heard the evidence and the arguments of counsel and having considered the memoranda of legal authorities filed by each of the parties, and it appearing to the Court that the Defendant had erroneously and illegally collected taxes, penalty and interest from the Plaintiff under the Limited Sales, Excise and Use Tax Act and the Local Sales and Use Tax Act and that the Plaintiff should recover of and from the Defendant the amount of the taxes, penalty and interest so erroneously and illegally collected and now held by the Defendant, together with interest at the rate of six per cent (6%) per annum from

March 6, 1969, the date of payment of such taxes, penalty, and interest by the Plaintiff, to the date of the refund thereof by the Defendant, and it further appearing to the Court that the Defendant had previously erroneously and illegally collected from the Plaintiff certain other taxes, penalty and interest but that the Defendant has heretofore on December 28, 1971, refunded to the Plaintiff a portion of such taxes, penalty and interest and that the Plaintiff should recover of and from the Defendant interest at the rate of six per cent (6%) per annum upon the amount of such taxes, penalty and interest from March 6, 1969, the date of payment of such taxes, penalty and interest by the Plaintiff to October 28, 1971, the date of the refund thereof by the Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Day and Zimmermann, Inc. recover of and from the

Defendant, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, the sum of ONE HUNDRED TWELVE THOUSAND SIX HUNDRED SIXTY EIGHT and 42/100 DOLLARS ($112,668.42) with interest thereon at the rate of six per cent (6%) per annum from March 6, 1969, together with its costs in this behalf expended, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, Day and Zimmermann, Inc., do have and recover of and from the Defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas the sum of TWO THOUSAND FIVE HUNDRED SIXTEEN and 59/100 DOLLARS ($2,516.59) representing interest at the rate of six per cent (6%) per annum from March 6, 1969, to October 28, 1971, upon the sum of Fifteen Thousand Eight Hundred Forty Eight and no/100 Dollars ($15,848.00) in taxes erroneously and

illegally collected by the Defendant and heretofore refunded to the Plaintiff on October 28, 1971, and for its costs in this behalf expended, for all of which let execution issue.

To which judgment, in open court, the Defendant, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, sitting at Austin, Texas.

SIGNED AND ENTERED THIS 25th day of May, 1973.

/s/ Herman Jones
District Judge, Travis County, Texas

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APPENDIX III

OPINION OF THE SUPREME COURT OF TEXAS

APPENDIX III

No. B-4512

SUPREME COURT OF TEXAS

Day and Zimmerman, Inc.,
Petitioner,

and

United States of America,
Intervenor,

v.

Robert S. Calvert
Comptroller of Public Accounts
of the State of Texas, et al.,
Respondents.

OPINION OF COURT

Day and Zimmerman, Inc., plaintiffs below, brought this suit to recover taxes paid under protest to the State Comptroller of Public Accounts on materials procured in the performance of its contract with the United States Government who has intervened and is a

party to this action. The trial court entered judgment for Day and Zimmerman allowing recovery of $112,668.42 in taxes, with interest, and an additional sum representing interest on another tax erroneously collected by the Comptroller which had been previously refunded. The court of civil appeals affirmed as to the recovery of interest with respect to the previously refunded tax since the parties on appeal confined the issues to that part of the judgment awarding recovery of the $112,668.42 taxes with interest. This latter portion of the trial court's judgment was reversed and judgment rendered that Day and Zimmerman take nothing by its suit for refund of taxes under the holding of the court of civil appeals that plaintiff purchased materials in the capacity of an independent contractor and not as an agent of the United States Government thereby precluding the appli-

cability of any exception to the levy of the State sales tax. 504 S.W.2d 945. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court. Day and Zimmerman is the operating contractor of a Government owned ordinance installation which is known as the Lone Star Army Ammunition Plant situated near the City of Texarkana, Texas. All the land, buildings and other structures comprising the Lone Star Plant is wholly owned by the United States Government and under the command of a military officer. Under their contract with the United States, Day and Zimmerman are responsible for the loading, assembling and packaging of ammunition and related components as well as the handling of the mechanics of procurement of all necessary materials, supplies, equipment and services.

The prime contract with the Government is based on what is known as a cost-plus-award-fee arrangement, whereby Day and Zimmerman receives, in addition to a reimbursement for its cost of operation, a fee for each item produced and accepted by the Government and an award fee based on such factors as cost savings, meeting delivery schedules and maintenance of a safety record. As costs are incurred in the performance of the prime contract, Day and Zimmerman submits to Government representatives vouchers requesting payment of such costs. In the normal course of business and as provided in the contract, payment is requested before there has been any actual disbursement of the funds. The voucher is supported by a statement of costs which have been incurred or a listing of checks that had been written in advance. Once checks in payment of the vouchers were received by

Day and Zimmerman, goods purchased were paid for.

Materials and supplies purchased are inspected upon delivery by personnel of Day and Zimmerman with representatives of the Federal Government monitoring these inspections on a random basis. Immediately upon acceptance, the materials are identified whenever feasible by labeling them "US LSAAP" (United States -- Lone Star Army Ammunition Plant). Under the terms of its contract, Day and Zimmerman is required to maintain an inventory of all property located at the ordnance installation and to carry out a program of maintenance, repair, protection and preservation of all such property. However, in the event of loss, destruction, damage or wear beyond repair of plant equipment, the operating contractor is not held financially responsible. Liability would only arise if such items

are lost, destroyed or damaged directly through willful misconduct or lack of good faith on the part of a major official of Day and Zimmerman.

Pursuant to the provisions of the Limited Sales, Excise and Use Tax Act, Title 122A, Chapter 20, Tex. Tax. - Gen. Ann. Stats., and the Local Sales and Use Tax Act, Article 1066c, Tex. Rev. Civ. Stat. Ann., the Comptroller conducted an audit on Day and Zimmerman for the period beginning April 1, 1964, and ending October 1, 1968.[1] The audit involved the tangible personal property, not including any of the component parts that went into the finished product, purchased and consumed by the operating contractor in the

[1] All statutory references hereafter shall be from the Limited Sales, Excise and Use Tax Act, Chapter 20. Taxation-General, Vernon's Annotated Civil Statutes, unless otherwise indicated.

performance of its contract with the Federal Government. Upon the basis of this audit the Comptroller made a deficiency determination which was assessed against Day and Zimmerman. Upon payment, the plaintiff filed an administrative claim for refund of the amount paid, however, after a hearing on the matter, the deficiency determination was upheld by the Comptroller.

As previously stated, the court of civil appeals decision turned on the determination of the question of whether Day and Zimmerman, in all phases of its performance including the procurement of materials, acted as an independent contractor making it liable for the sales taxes, or, whether the plaintiff acted as an agent of the United States so as to cause these sales to be exempt from tax under articles 20.04 (C) and (H). In support of that court's conclusion that Day and Zimmerman were not agents of the

Federal Government, the prime contract with the Government provides:

> [T]he contractor, as an independent contractor and not as an agent of the Government, shall, upon the terms, conditions and provisions herein set forth, furnish all personnel, labor, equipment, supplies, materials...

The "Terms and Conditions" attached to the purchase order form used by Day and Zimmerman in procuring goods and services pursuant to their contract with the Federal Government also lead to the conclusion that Day and Zimmerman was the entity to whom the title to the goods passed, rather than the Government. The "Definitions" section states that "'Buyer' means Day and Zimmerman" and the section entitled "Buyer's Status" reads

> All rights and claims of every kind and nature, including the right to title and ownership of the goods or services covered by this Purchase Order, may be assigned and transferred by Day and Zimmerman, Inc. to the United States Government; however, this Purchase Order

> does not bind or purport to bind the United States Government or any officer thereof.

This provision plainly contemplates that Day and Zimmerman is to purchase, in its own name and on its own credit, all the materials required and that the Government is not to be bound by the purchase contracts, but rather is obligated only to reimburse the plaintiff according to the prime contract. See Alabama v. King and Boozer, 314 U.S. 1 (1941). In view of these facts we agree that Day and Zimmerman assumed the status of an independent contractor and that no direct sales by the vendors to the Federal Government, as contended by the plaintiff, resulted from this arrangement.

Day and Zimmerman alternatively contends that if it was not an agent of the Federal Government, procuring direct sales of materials to the United

States, that the sales were nevertheless not taxable under the "Sale for Resale" exemption found in article 20.04(O).[2]

This exemption states in part:

> Sale for Resale: Leasing or Renting
> (1) There are exempted from the taxes imposed by this Chapter the receipts from all sales for resale, leasing, renting or for transfer as an integral part of a taxable service rendered in the regular course of business.

Article 20.01, the definitional section of the Limited Sales, Excise and Use Tax Act, defines a "Sale for Resale" in subdivision (S) as being

> A sale of tangible personal property to any purchaser who is purchasing said tangible property for the purpose of reselling it within the geographical limits of the United States of America, its territories and possessions, in the normal course of business either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property.

We must determine, therefore, whether a sale took place between the vendor and Day and Zimmerman, and thereafter, whether a sale between Day and Zimmerman and the Federal Government occurred. The court of civil appeals, while holding that Day and Zimmerman did acquire title, however fleeting, did not discuss when a resale, if any, took place. We again turn to the definitional section where the term "sale" is defined in article 20.01 (K) (1) (a):

> "Sale" means and includes any transfer of title or possession, or segregation in contemplation of transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

This being a specific definition by the legislature of the term "sale," such is binding on the courts. Hurt v. Cooper,

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[2] It should be noted that this exemption is also incorporated by reference into the Local Sales and Use Tax Act, Article 1066c under section 6C(1) of that act.

130 Tex. 433, 447-448, 110 S.W.2d 904-905 (1937). As construed by this Court in Gifford-Hill and Co. v. State, 442 S.W. 2d 320 (Tex. 1969), when materials are loaded upon trucks of a common carrier or other means of transportation, a "segregation in contemplation of transfer of title or possession" occurred and a sale takes place between the vendor and vendee under the provisions of the Limited Sales, Excise and Use Act.

In determining whether a sale took place between Day and Zimmerman and the Federal Government, the pertinent inquiry to be made under the facts of the instant case and the definition of a sale set out above is whether there was a transfer of title or possession from Day and Zimmerman to the United States. As between Day and Zimmerman and its vendor, title to the materials and supplies purchased was to vest in Day and Zimmerman, under

the "Terms and Conditions" attached to the purchase order used by Day and Zimmerman, as follows:

> Title to goods purchased hereunder shall pass to Buyer (Day and Zimmerman) on acceptance thereof. However, all such goods are subject to inspection by Buyer and the Contracting Officer (for the Federal Government) at the designated delivery point within a reasonable time after arrival and Buyer reserves the right to reject any goods which do not pass such inspection.

Title therefore appears to have vested in Day and Zimmerman after inspection and acceptance at the Lone Star Plant, although, as previously stated, the "sale" between Day and Zimmerman and its vendor took place when the goods were readied for shipment to the plant. With reference to the transfer of title from Day and Zimmerman to the Government, after the inspection and acceptance of the materials by Day and Zimmerman, they were labeled as property of the Federal Government.

Additionally, the prime contract between Day and Zimmerman and the Government recites that

> [T]itle to all property purchased by the Contractor (Day and Zimmerman), for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor.

Giving effect to such language in a contract is in consonance with Section 2.401 (a), Tex. Bus. and Comm. Code Ann. wherein it is stated that "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties."

In view of the distinct, identifiable transactions between Day and Zimmerman and its vendor and Day and Zimmerman and the Federal Government, it is clear that the initial purchases by Day and Zimmerman were not taxable under the "Sale for Resale" exemption. Art. 20.04 (O).

Additionally, the second sale between Day and Zimmerman and the Federal Government is also exempt under both articles 20.04 (C) and (H) since they are sales the State is "prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State"; and constitute "the receipts from the sale,... of any taxable items to,...[t]he United States, its unincorporated agencies and instrumentalities."

The judgment of the court of civil appeals is reversed, and the judgment of the trial court is affirmed.

James G. Denton
Justice

Opinion delivered January 29, 1975.

No. B-4512

SUPREME COURT OF TEXAS

Day and Zimmerman, Inc.,
Petitioner,

v.

Robert S. Calvert
Comptroller of Public Accounts
of the State of Texas, et al.,
Respondents.

Petitioner's motion for rehearing, filed in the above numbered and entitled cause on February 12, 1975, having been duly considered, it is ordered that said motion be, and hereby is overruled.

March 5, 1975